

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
No. 09-10364-WGY

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THE GENERAL HOSPITAL
CORPORATION, doing business as
Massachusetts General Hospital,

Plaintiff,

v.

QLT PHOTOTHERAPEUTICS
(CANADA), INC.

Defendant.

* * * * *

MOTION HEARING

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

GRIESINGER, TIGHE & MAFFEI, LLP (By Thomas
F. Maffei, Esq., Daniel P. Tighe, Esq. and Scott
McConchie, Esq.), 176 Federal Street, Boston,
Massachusetts 02110, on behalf of the Plaintiff

HERMES, NETBURN, O'CONNOR & SPEARING (By
Peter G. Hermes, Esq. and Jeffrey P. Hermes,
Esq.), 265 Franklin Street, 7th Floor, Boston,
Massachusetts 02110

- and -

LATHAM & WATKINS LLP (By Mark A. Flagel,
Esq.), 355 South Grand Avenue, Los Angeles,
California 90071-1560, on behalf of the Defendant

1 Courthouse Way
Boston, Massachusetts

May 21, 2009

1 **THE CLERK:** Calling Civil Action 09-10364, General
2 Hospital Corp. v. QLT.

3 **MR. MAFFEI:** Your Honor, may I use the podium?

4 **THE COURT:** You may. And would counsel introduce
5 themselves.

6 **MR. MAFFEI:** Thomas Maffei for the General Hospital
7 Corporation, your Honor.

8 **MR. TIGHE:** Daniel Tighe, T I G H E, for the
9 General Hospital Corporation, your Honor.

10 **MR. McCONCHIE:** And Scott McConchie for the General
11 Hospital Corporation.

12 **MR. FLAGEL:** Good afternoon, your Honor. Mark
13 Flagel of Latham and Watkins for QLT.

14 **MR. JEFFREY HERMES:** Jeffrey Hermes of Hermes
15 Netburn for QLT.

16 **MR. PETER HERMES:** Good afternoon, your Honor.
17 Peter Hermes of Hermes Netburn for defendant QLT.

18 **THE COURT:** All right. Mr. Maffei, I'll hear you
19 first on the motion to remand, and in response to QLT's
20 motion to dismiss, briefly.

21 **MR. MAFFEI:** Your Honor, may I defer to my partner
22 on the motion to remand.

23 **THE COURT:** Sure, I don't care who argues.

24 **MR. TIGHE:** Good afternoon, your Honor, thank you.
25 Your Honor, on the motion to remand as you know,

1 the subject of that is a clause in the license agreement
2 which provides essentially two --

3 **THE COURT:** Right. I'm familiar with the papers.
4 Isn't that simply -- for one thing, it's not expressly clear
5 that your choice as to, in Massachusetts as between state
6 and federal courts must be respected. Isn't it open to them
7 to remove?

8 **MR. TIGHE:** Well, your Honor, the case law that
9 looks at cases in which one party gets to choose a venue,
10 which, which this would fall under, says that if the other
11 party reserves its right to remove that that will negate the
12 choice. So, there are jurisdictions in which a waiver must
13 be clear and unequivocal. The First Circuit has not adopted
14 that stated --

15 **THE COURT:** True. Nor does the First Circuit adopt
16 a contrary position, do they?

17 **MR. TIGHE:** That's correct, your Honor.

18 **THE COURT:** Yes. And what do you say about this,
19 they give me this recent case, again, it's only persuasive,
20 out of the Southern District of New York here.

21 **MR. TIGHE:** Your Honor, that, the J.P. Morgan case
22 was decided, I believe just last month, perhaps even earlier
23 this month. But in the Second Circuit, again, the rule is
24 that a waiver of removal rights must be clear and
25 unequivocal. That's not the law in this circuit, your

1 Honor.

2 **THE COURT:** Well, let's jump to the second issue
3 now. And if you are here you say that the case has to be
4 dismissed.

5 **MR. TIGHE:** Remanded, your Honor.

6 **THE COURT:** Well, assume you've lost that. Just
7 assume it.

8 **MR. TIGHE:** Yes.

9 **THE COURT:** Just assume it. So, why should it be
10 dismissed?

11 **MR. TIGHE:** Your Honor, we're opposing the motion
12 to dismiss.

13 **THE COURT:** I understand that. Why shouldn't it be
14 dismissed?

15 **MR. TIGHE:** I'm sorry, then we're moving on to the
16 next motion, your Honor?

17 **THE COURT:** Well, I -- yes. Thank you.

18 **MR. TIGHE:** I apologize. We were splitting --

19 **THE COURT:** Mr. Maffei, why should it be dismissed?
20 On the theory -- here's their strongest argument as I see
21 it. Their strongest argument for dismissal is that what
22 happened in my case doesn't constitute a license. Their
23 weaker argument is, based upon what you have alleged, they
24 may still have to stand up to a 93A action.

25 Why don't you address, since you're opposing, why

1 don't you address this license thing.

2 **MR. MAFFEI:** Your Honor, there's two ways to look
3 at this most favored nation clause, a narrow way and a broad
4 way. And actually based on what we found out happened in
5 March of '07, whether you look at it broadly or narrowly,
6 what happened in this courtroom in connection with what
7 happened in March of '07 was without question a grant of
8 patent rights in return for the royalty that the jury
9 awarded Mass. Eye & Ear.

10 **THE COURT:** But we thought in that case the only
11 way to evaluate the damages was, was by a royalty. That was
12 the only way to place a value on the unjust enrichment.
13 That doesn't seem to me to be a license.

14 **MR. MAFFEI:** Well, your Honor, if you, and you know
15 this case so much better than I do, certainly, the entire
16 gist of the action before you, while characterized as an
17 unjust enrichment case, was in fact, and I've read the
18 transcript closely and I've pulled out all of the excerpts,
19 it is, it was in fact trying to value the license which
20 Mass. Eye & Ear said QLT had promised to give them. Now,
21 for whatever reason they couldn't make their peace so they
22 ended up in litigation. So, the situation we have is we
23 have a most favored nation clause, which by the way is
24 fairly broad. It says royalty and other compensation, it
25 doesn't say written, it doesn't say voluntary, and the

1 entire history of this was we're in this together. Mass.
2 General actually initiated the idea of this blockbuster
3 treatment, everybody went forward, QLT ended up -- I'm
4 sorry, strike that, Mass. Eye & Ear ended up on the patent
5 all by itself. When the other two institutions found out
6 about it they said that can't be, we all participated in
7 this. And there was an agreement made. And the agreement
8 was everyone will go on the patent. QLT had the rights to
9 the drug. And QLT promised both Mass. Eye & Ear and Mass.
10 General that they would pay them a fair royalty. Now, the
11 fact that it was extended, the fact that it ended up in
12 litigation with one of those two parties shouldn't sort of
13 allow them to avoid the reality which is they always, from
14 day one, said they would treat us both the same. They had
15 even made the same offers to us. We, because Mass. General
16 didn't want to get embroiled in all kinds of litigation,
17 said we'll take .5 today, but if Mass. Eye & Ear ends up
18 getting more you have to pay us the same. They said fine.
19 We signed off.

20 So, they go through this litigation and then lo and
21 behold in the middle of the litigation this issue about
22 judicial admissions came up, and Mr. Ware, and I can quote
23 him, he says, look, this is an unjust enrichment case, but
24 all of the things that were done in this case, we paid for
25 all of that. So the only thing left now is a transfer of

1 patent rights. And by the way, there was no transfer of
2 patent rights, so Mass. Eye & Ear loses. And, because of
3 the way the case developed, during the case you correctly
4 pointed out, well, now, wait a minute, they said that they
5 would grant you a license, in fact, they, they have now
6 said, in a judicial admission way, they'll give you a
7 license. And in fact they did give them a license. Not
8 only in the courtroom that day by reason of the judicial
9 admission, but, and we didn't know this at the time this all
10 started and I got involved, in March of '07, and I think
11 this is the, this is, this is what puts the fine point on
12 it, in March of '07, QLT and Mass. Eye & Ear entered into a
13 series of agreements only one or two of which we were shown.
14 Now, they say, well, we filed a stipulation dismissing the
15 related case so you knew. Our allegation in the complaint,
16 and we can prove it, is we had no knowledge about the
17 license agreement.

18 **THE COURT:** I think I understand. Let's move to
19 the defendant here. Their motion to remand is denied.
20 We're dealing with your motion to dismiss.

21 It does seem to me, and this is where you ought to
22 focus your attack, it seems to me that given this pleading,
23 at minimum they're standing with a 93A action against you on
24 these allegations.

25 What do you say to that?

1 **MR. FLAGEL:** If you look at the most favored
2 nations clause, which the hospital wrote, it actually
3 doesn't say what Mr. Maffei just told the Court it said.
4 And it could have. If they had written it to say if under
5 any circumstances the infirmity gets more than you give us,
6 we get the same. We wouldn't be here today if the clause
7 said that. What it says is if QLT concludes a license
8 agreement with the infirmity under terms in which it gives
9 them more, we get the same amount. And the reason there's
10 no, there's no claim under 93A, your Honor, is because we
11 have an undisputed situation where we know that that trigger
12 never occurred. They even acknowledge in footnote 13 of
13 their opposition that QLT was under no obligation to
14 actually enter into a contract with the infirmity. That's
15 something you had observed to the jury as well. And you're
16 both right about that. Given that, we have a clause they
17 wrote that has a very clear and unambiguous trigger. It's
18 conditional. If a certain event happens then we have to do
19 something. And if QLT had ever entered into an actual
20 agreed arm's length license with the infirmity to pay them
21 more, you would be right.

22 **THE COURT:** Suppose you're right.

23 **MR. FLAGEL:** Yes, sir.

24 **THE COURT:** Given their allegations --

25 **MR. FLAGEL:** Yes.

1 **THE COURT:** -- of what your side was saying,
2 though, haven't they stated a claim under 93A?

3 **MR. FLAGEL:** I don't think so. Because what they
4 say is that for ten years, QLT has been saying we will
5 comply with the most favored nations clause. And there's no
6 question about it, QLT will, always intended to comply with
7 the clause as written and provided by the hospital under its
8 unambiguous language, which is to say, if we agree to pay
9 the infirmity more, we will pay you more. But that, that
10 didn't happen. In fact, you'll remember, your Honor, the
11 First Circuit, you actually granted summary judgment on all
12 the contract claims which the First Circuit affirmed. They
13 sent the case back on, on unjust enrichment type claims that
14 really focused on as you acknowledge something different.
15 So, here there is no question about compliance with that
16 clause.

17 **THE COURT:** All right, I understand the argument.
18 The motion to dismiss is allowed as to the claim
19 under the license agreement, denied as to 93A.

20 Do you want to try this before a magistrate judge
21 or in this Court?

22 **MR. MAFFEI:** I would like to confer with my client
23 on that, your Honor, if I may.

24 **THE COURT:** That's fine. So, we'll assume we'll
25 stay here so I have to -- when do you want to go to trial in

1 this case? The latest time available is June 2010, but we
2 could try it well before that.

3 **MR. FLAGEL:** June 2010 is fine with me. I've got
4 lot of things going on early next year.

5 **THE COURT:** June 2010?

6 **MR. MAFFEI:** June 2010.

7 **THE COURT:** It's on the running trial list for June
8 2010.

9 When do you want to go to ADR?

10 **MR. FLAGEL:** Whenever --

11 **THE COURT:** The choice is really early or late,
12 after you've sunk your costs into discovery, or early, which
13 would be, say, September.

14 **MR. MAFFEI:** Your Honor, we did go to ADR before
15 Judge Cowin, and if we do another, another try at it, which
16 I'm not opposed to, I think it would be worthwhile for us to
17 have some discovery before we do that because we are just
18 going to --

19 **THE COURT:** Say January next year.

20 **MR. MAFFEI:** That, that would be fine.

21 **MR. FLAGEL:** Yes.

22 **THE COURT:** January 2010. File your joint proposed
23 case management schedule two weeks from today. Should you
24 decide to go to a magistrate judge, let the Court know
25 should you both decide and of course the magistrate judge

will pick up. That's the order.

MR. MAFFEI: Thank you, your Honor.

THE COURT: Thank you.

MR. FLAGEL: So, your Honor, just for clarification, all the claims are dismissed except for 93A?

THE COURT: 93A, that's correct.

MR. FLAGEL: Thank you, your Honor.

MR. MAFFEI: Thank you, your Honor.

(Whereupon the matter concluded.)

C E R T I F I C A T E

I, Donald E. Womack, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/ DONALD E. WOMACK

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